



BOOK REVIEW

Merry and McCall Smith's *Errors, Medicine and the Law* (2nd ed.), by Alan Merry and Warren Brookbanks,

Cambridge, Cambridge University Press, 2017, £34.99 (paperback), viii+ 412, £34.99 (paperback), ISBN 978-1-316-63225-3

In 2001, Professors Alexander McCall Smith and Alan Merry published a groundbreaking book. They also successfully advocated for reform of New Zealand's criminal law in response to doctors being prosecuted for negligent manslaughter.

The second edition, *Merry and McCall Smith's Errors, Medicine and the Law*, reanimates the argument for legal reform. In the foreword to this second edition, Professor McCall-Smith recalls:

The injustice of (these criminal prosecutions) was there are for all to see, and it struck us as indefensible that morally innocent people could be convicted of manslaughter when they had made a mistake that did not in any way reflect recklessness or malign intention on their part (p.vii).

Professor Alan Merry, a clinician and academic, is joint author with Professor Warren Brookbanks, an international criminal law academic. Both are deeply concerned with legal responses to accidents and errors within healthcare contexts. In their view, the traditional legal approaches have perpetuated a damaging cycle of retribution. They prefer a culture of forgiveness, which may more broadly reduce social conflict.

Readers of *Psychiatry, Psychology and Law* will appreciate the authors' insights regarding the anti-therapeutic effects that often accompany litigation. The analysis is relevant for diverse healthcare providers,

including mental health professionals who face the prospect of complaints from aggrieved clients and patients, and their advocates. The authors offer both comfort, by sensitively expressing the challenges of healthcare practice, and hope, through recommendations for legal reform.

After analysing the prominence of blame within today's culture, they persuasively argue that legal conflicts often cause significant harm. This damage may extend from patients, clinicians and their professions to future clinician–patient relationships and the wider healthcare system. The authors propose alternatives, based upon contemporary interdisciplinary research.

Professors Brookbanks and Merry have closely studied the damaging psychological impact of legal conflict when clinicians unintentionally injure their patients and clients. The authors observe that a fear of receiving complaints may inhibit the judgement of clinicians, result in “suspicious formality” and ultimately be a disservice to patients.

Encompassing civil and criminal law, the book focuses on common law systems, including in England and Wales, Scotland, Canada, Australia, New Zealand and the United States. Beginning with a discussion of accidents, an accessible critique of selected legal cases is offered. The concept of blame is uncoupled from the need for an explanation of the mistake, the expectation that it will not recur, and compensation. The role of

punishment within present legal systems and wider social relations is discussed at length. Also, the limited deterrent effects of litigation and prosecution are discussed, based on research.

Next, the impact of the “human factor” upon medical mishaps is addressed. Noting that iatrogenic harm is inevitable in a clinician’s career, the authors also acknowledge the inevitable challenges that complex systems and technology present. If prevention is a priority, rooting out individual clinicians may be an inadequate strategy within a wider system of failure and inadequacies.

Psychologists are likely to be particularly stimulated by the research on how cognition, perception, memory and stress affect professional performance. The authors aid in understanding how the mind operates, particularly in complicated, high-risk settings. Through case examples, the book highlights human fallibility and the complexity of practice, encouraging scrutinisation of the circumstances when clinicians should, and should not, be held morally culpable for the harm that they unintentionally cause.

Diverse facets of blame are compared in relation to negligence and recklessness. Also, a comparative analysis graphs the evolution in the legal standard of care across select jurisdictions. Importantly, the authors observe that a shift has occurred from what can *reasonably* be expected of a clinician to what *ideally* should be done. As can be appreciated, the complaints of aggrieved patients are not always attributable to substandard practice; sometimes healthcare results fall short of a patient’s expectations through no fault of the clinician. Nevertheless, clinicians may be caught in the crossfire, and the discussion of how legal systems grapple with this shift in expectations is enriched by lessons from psychology research, legal scholarship and disaster theory.

The role of expert witnesses is also explored, including their selection and sources of knowledge. The phenomenon of outcome bias and the dilemma of the “unethical expert”

are addressed. To secure robust evidence, the authors recommend that expert witnesses be required to cite sources and authorities.

Professors Brookbanks and Merry aim to reduce inappropriate findings of culpability in clinicians and to promote their enduring therapeutic relationships. To this end, they thoughtfully critique the impact of the fault-based tort system in the healthcare setting. The limitations of litigation are detailed, with consideration of prevention, compensation, deterrence and restoration. For comparison, the no-fault compensation schemes in New Zealand and Nordic countries are discussed, with recommendations for legal and healthcare system reform.

Provisions for criminal liability in England and Wales, Scotland, New Zealand, Australia, Canada, France and the United States are compared, and the authors comment on the surprising and dramatic increase in the criminal prosecution of clinicians in England and Wales after the turn of the millennium. Recognising that healthcare has inherent – and often significant – risks, they remind us that in the majority of cases harm is the result of well-intentioned acts. They refer to proposals for a new, higher test of recklessness for medical manslaughter in those rare circumstances when clinicians are criminally blameworthy for the death of a patient. In their estimation, the criminal law is a blunt tool that is “is ineffective in promoting safety, frequently fails to provide either true justice or a desired outcome for those who loved the deceased patient and typically makes bad situations much worse” (p. 8).

The authors observe that an “inflation of blame” has contaminated clinician–patient relationships. Proposing a fresh strategy to avert the psychological damage of legal conflict, they advocate for “therapeutic recalibration”, a notion derived from principles of therapeutic jurisprudence. Concrete recommendations bring life to these proposals.

The book inspires us to re-examine how adverse events are, and ideally should be, resolved. Given that iatrogenic harm occurs in all countries and in diverse circumstances,

these insights have great relevance to those who provide, and those who receive, health-care. Throughout, the arguments are supported with case summaries that are eloquently expressed in layperson language. This text is a rich resource for those who teach, research and practice in fields related to medicine and medical law. Also, it is a very informative and stimulating complement to texts on health law, medical ethics, torts and criminal law. But this book is more than simply an academic resource – it is a gift. By

focusing on the heart of legal conflict, this book inspires the crafting of more humane strategies for aggrieved patients and those who serve them.

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